

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1139

To be argued by
ROBERT J. COSTELLO

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1139

UNITED STATES OF AMERICA,

Appellee,

—v.—

BENJAMIN MALLAH,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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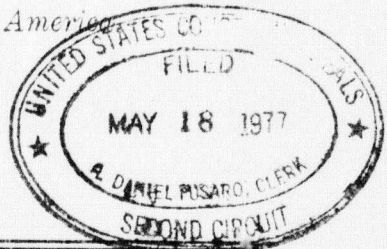


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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Benjamin Mallah appeals from an order of the United States District Court for the Southern District of New York, filed on February 25, 1977, by the Honorable Milton Pollack, United States District Judge, denying Mallah's motion pursuant to Rule 33 of the Federal Rules of Criminal Procedure for a new trial on Indictment 73 Cr. 881.

Indictment 73 Cr. 881, filed September 20, 1973, charged Mallah, Vincent Pacelli, Jr., Alfred Catino, Barney Barrett, Alfred De Franco and seven other co-defendants in eight counts with various violations of the federal narcotics laws, Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and 846. Trial of the defendants Mallah, Pacelli, Catino, Barrett and De Franco commenced on December 18, 1973, before

Judge Pollack and a jury. At the conclusion of the Government's case, Judge Pollack granted motions for a judgment of acquittal on Counts Five, Six and Seven as to Mallah and on Count Four as to Pacelli. On January 8, 1974, the jury found the defendants Mallah, Pacelli, Catino and Barrett guilty on Count One, the conspiracy count. The jury also found Catino guilty on Count Two and Pacelli guilty on Counts Two and Six. Pacelli was acquitted in Counts Three, Five and Seven, and De Franco was acquitted on Counts One and Two, the only counts in which he was named. On February 26, 1974, Judge Pollack sentenced Mallah to a term of ten years imprisonment on Count One, to be followed by a three year special parole term, and a \$25,000 fine.

Mallah's conviction, as well as the convictions of Pacelli, Catino and Barrett, were affirmed by this Court, *United States v. Mallah*, 503 F.2d 971 (2d Cir. 1974), and the mandate issued on December 11, 1974. The Supreme Court denied a petition for *certiorari* on March 25, 1975, 420 U.S. 995 (1975).

On July 26, 1976, Mallah filed a petition to vacate his conviction pursuant to Title 28, United States Code, Section 2255 on the grounds that the Government deliberately suppressed evidence favorable to him and had allowed a witness, Cecile Mileto, to perjure herself. The petition was denied without a hearing in a memorandum opinion by Judge Pollack filed on October 19, 1976. On February 7, 1977, this court affirmed that order on the opinion below.

On January 10, 1977, Mallah filed the present motion for a new trial, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, based on "newly discovered evidence" that a Government witness, Joseph Conforti

perjured himself during cross-examination and that the Government knew or should have known of the alleged perjury. The motion was denied by Judge Pollack in a written opinion filed February 25, 1977. This appeal followed.

Statement of Facts

A. The Testimony at Trial

The facts underlying this case are summarized in this Court's opinion in the original appeal. 503 F.2d at 975-976. In sum, this Court found that the Government proved a "large organization engaged in distributing heroin and cocaine in New York and that appellant Mallah acted as banker to the operation." *Id.* at 975. While a detailed summary of all of the evidence is unnecessary for the present discussion, we summarize here the testimony particularly pertaining to Benjamin Mallah; this evidence must, of course, be viewed in the context of the other evidence, which demonstrated the existence of the overall conspiracy.*

One of the witnesses against Benjamin Mallah was Joseph Conforti. Conforti testified that in July 1971 he traveled to Philadelphia with Louis Mileto, where the latter delivered a kilogram of heroin to one of Herbert

* This point is of considerable significance, since, as this Court has noted, once the existence of a conspiracy has been demonstrated, only "slight" evidence is needed to prove a defendant's participation in it. *United States v. Marrapese*, 486 F.2d 918 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974). Indeed, the Government need only show a "likelihood of illicit association" between the defendant and the other conspirators. *United States v. Mejias*, Dkt. No. 76-1384, slip op. 2269, 2289 (2d Cir., March 10, 1977); *United States v. Calabro*, 449 F.2d 885, 891 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

Sperling's customers.* After the delivery, Mileto showed Conforti a box containing \$60,000. (Tr. 650-52).** When Conforti asked if the money was for Sperling, Mileto said, "No, its going to Bennie, one of his partners." (Tr. 653).

During the return trip to New York, Conforti asked Mileto who Bennie was. Mileto stated that "Bennie was Herbie's partner, his backup man for money problems if you needed money in the junk business, Bennie was there to give him money." He further stated that "this money was to be delivered to Bennie." (Tr. 653). In New York, Mileto picked up an additional \$17,000, which was placed in the same shoe box and wrapped with the same paper. Mileto and Conforti then drove to Spring Street where Conforti remained in the car while Mileto went into Sperling's building. Some 15 or 20 minutes later Conforti saw Mallah exit the building carrying the box of money, which he recognized because of the paper with which it was wrapped. When Mileto returned to the car, Conforti asked him "who is that guy carrying the money." Mileto told Conforti that "it was Ben Mallah" (Tr. 653-56).***

In February 1972, Conforti was present at 5 Spring Street when Mallah and Sperling were in the bedroom talking to Louis Mileto following the latter's arrest.

* Louis Mileto, Cecile Mileto's husband, had worked for Herbert Sperling, and both Conforti and Louis Mileto were named as co-conspirators. Sperling had been previously tried and convicted on July 12, 1973, for his role in the conspiracy. *United States v. Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

** "Tr." refers to the trial transcript; "App." and "Br." refer to Mallah's appendix and brief, respectively.

*** At trial, Conforti identified the defendant Mallah as the same Ben Mallah pointed out to him by Mileto that night. (Tr. 655-56).

Conforti overheard Sperling berating Mileto in Mallah's presence for having extra packages of heroin that Sperling had discovered when Conforti, the day before, delivered to Sperling the heroin stored by Mileto in an apartment. Conforti also heard Sperling (who apparently concluded that Mileto had been stealing some of his heroin and selling it on his own) tell Mallah, "I told you so," to which Mallah replied, "What could you do?" (Tr. 699-700).

In November 1972, Conforti, Mallah and others were seated together at a table in the Stage Delicatessen in Manhattan. Barney Barrett, in Mallah's presence, instructed Conforti on the procedure to be followed should Conforti run low on mix for narcotics. (Tr. 717).

Barry Lipsky, also named as a co-conspirator, testified that during one of his trips with Pacelli to Ballantine's barbershop in the summer of 1971 to obtain narcotics, Lipsky asked Pacelli to identify the people standing in front of the barbershop with Sperling. Pacelli then told Lipsky that one of the persons was "Louis" and that "Louis works for Herby." (Tr. 95). Lipsky then asked Pacelli "who's that other guy, with the bald head and the suntan and yellow sunglasses?". Pacelli told Lipsky "That's Benny Mallah, Herby's junk partner." (Tr. 95-96).

In addition, Cecile Mileto, the widow of co-conspirator Louis Mileto, testified about her knowledge of the narcotics activities of Herbert Sperling and others. With particular reference to Benjamin Mallah, she stated that shortly before Christmas 1971, she went to 5 Spring Street with her husband. Seated by themselves in the kitchen of the apartment were Sperling and Mallah. Sperling counted a large sum of money, and when he

finished, stated that \$75,000 "isn't too bad a haul." (Tr. 46-50). The \$75,000 was placed in an attache case, which Mallah took with him when he left the apartment. (Tr. 50).

After another witness was taken out of turn, Mrs. Mileto returned to the stand and further described another visit to Sperling's apartment where she saw Mallah and Sperling standing next to a table on which she saw several packages of white powder. Several packages were placed in a shopping bag, Mallah asked Sperling whether he would have enough money for it. (Tr. 204-06).

Other Government witnesses also implicated Mallah. Patrolman Gerald Lino testified concerning a conversation pertaining to the acquisition of narcotics between Sperling and Mallah that he overheard on August 16, 1972, while secreted in a car parked in front of the barbershop at 844 Seventh Avenue. Minutes later, Lino overheard co-conspirator Norman Goldstein ask Barney Barrett, "Are they going to get it?", to which Barrett replied that he didn't know. Goldstein then sent Barrett back into the bar which Sperling and Mallah had entered, to find out. Barrett came out shortly and told Goldstein, "Yes, we should have it tomorrow" (Tr. 1180-85). Photographs taken at the time of these conversations corroborated the meetings about which Lino testified.

In addition the Government proved Mallah's flight to avoid prosecution. (Tr. 1269-74, 1281). Finally, at the time of his arrest, Mallah had more than \$8,500 in his possession and two sets of false identification papers. Mallah had no identification in his true name. (Tr. 1258-69; GX 74).

Testifying in his own behalf Mallah claimed he was a bookie and admitted knowing Sperling but denied know-

ing Pacelli.* Mallah also denied knowing Joseph Conforti, Louis Mileto, Cecile Mileto or ever being in 5 Spring Street, Herbert Sperling's apartment. (Tr. 1365-1426). On the Government's rebuttal case, Mallah was contradicted by Sergeant DeLuca and Cecile Mileto's son, Mark Miklitsch, all of whom observed him in conversations with Louis Mileto in 1971 and physically in Sperling's Spring Street apartment during that same year. (Tr. 1473-76, 1480-83).

B. Mallah's Rule 33 motion

The present motion for a new trial, made pursuant to Rule 33 of the Federal Rules of Criminal Procedure or alternatively under Title 28, United States Code, Section 2255,** is based on the claimed perjury of Joseph Conforti, a Government witness, committed during the *Mallah* trial. Mallah contends that the Government knew or should have known of the alleged perjury.

The alleged perjurious testimony, elicited for the first time on cross-examination, concerned a delivery of a kilogram of heroin by Conforti to Sam Kaplan in a hospital room. Conforti testified that Jack Spada had accompanied him to the hospital, but had remained downstairs when Conforti made the delivery of heroin. Mallah now claims that the inclusion of Jack Spada at that delivery constituted perjury because records revealed during a related case *** showed that Kaplan was in Community

* Lipsky had testified that he had seen Mallah with Pacelli on at least four occasions in the summer and fall of 1971. (Tr. 87, 94-96, 134, 148-49).

** Following a Government letter to Judge Pollack dated February 17, 1977 (App. 29-30), suggesting that the Rule 33 motion was untimely, Mallah's counsel asked the District Court to treat the motion as a motion pursuant to 28 U.S.C. § 2255. (App. 31).

*** *United States v. De Saverio*, 76 Cr. 195 (MEF).

Hospital in Brooklyn from April 23 to May 5, 1972 and that during that time period Jack Spada was in Atlanta Federal Penitentiary. Mallah claims that the Government either knew or should have known these facts.

In response to Mallah's motion, the Government filed an affidavit of an Assistant United States Attorney summarizing the trial testimony demonstrating that there was no reasonable likelihood that the alleged perjury would have affected the judgment of the jury, and further pointing out that the Government neither knew nor should have known of the alleged perjury. The affidavit further noted that Mallah had failed to exercise due diligence in discovering this "new" evidence. (App. 31). Indeed, the Government was unaware of any "hospital delivery," and thus was unaware of any of the participants, since the testimony concerning the hospital delivery was elicited for the first time on cross-examination. (Tr. 1606). This testimony came in response to a defense contention that Conforti had attempted to extort money from Sam Kaplan in a tape recorded telephone conversation.* That tape recording—which specifically mentioned the delivery of narcotics by Conforti to Kaplan when Kaplan was in the hospital for a stomach operation—had obviously been provided to Mr. La Rossa by Sam Kaplan. Defense counsel was therefore aware of the alleged hospital delivery incident, its participants,** as well as the time of

* This tape recording was in the possession of Mr. La Rossa, Mallah's counsel during that trial. Mr. Shargel, Mallah's current counsel, was Mr. La Rossa's partner at the time. The firm of La Rossa, Shargel and Fischetti had represented Kaplan at the earlier trial of *United States v. Sperling, et al.*

** While defense counsel was in possession of the recording prior to trial, at the very latest defense counsel became aware during the trial that Jack Spada was the third participant in the hospital delivery. (Tr. 779-80).

Kaplan's hospital stay. Mallah's counsel made no inquiry either before, during, or after the trial, of any federal agency, as to the whereabouts of Jack Spada during April and May 1972.

C. The District Court's decision

On February 25, 1977, Judge Pollack filed a twelve page decision denying Mallah's motion without a hearing. (App. 32). Judge Pollack found that a) there was "no reasonable likelihood" that the claimed perjury would have affected the judgment of the jury or resulted in a different verdict; b) there was no showing that this "new evidence" could not have been discovered earlier in the exercise of due diligence; and c) that the motion which was made more than two years after the issuance of the mandate by this Court was untimely.

ARGUMENT

The District Court Properly Denied Mallah's Motion For A New Trial.

Mallah contends on this appeal that the District Court erred in denying his motion without an evidentiary hearing. This argument is without merit for at least three different reasons. First, Judge Pollack properly found that there was no reasonable likelihood that the alleged perjury would have affected the jury's verdict; second, Mallah failed to exercise due diligence in discovering the alleged perjury. Third, the motion was untimely.

A. There was no reasonable likelihood that the alleged perjury would have affected the verdict.

Assuming, *arguendo*, that Conforti's testimony that Jack Spada was at the hospital when Conforti delivered the kilogram of heroin to Sam Kaplan, was false, the District Court must then decide if there is a "reasonable likelihood"* that the timely uncovering of this falsity would have produced a different verdict. *United States v. Agurs*, 427 U.S. 112-14 (1976). There was ample evidence to support Judge Pollack's finding that it would not.

As Judge Pollack observed, and as this Court noted in that portion of its opinion affirming Mallah's conviction dealing with the sufficiency of the evidence, 503 F.2d at 975-76, the evidence against Mallah, other than Conforti, was ample.** Of principal significance, Patrolman

* In his earlier opinion denying Mallah's similar claim for relief on an allegation that witness Cecile Mileto perjured herself during trial, Judge Pollack noted that even if believed the allegations would not meet the "reasonable likelihood" test. Since Judge Pollack's ruling was subsequently "affirmed on the opinion below," it follows that the test there enunciated governs this case as well.

** In his charge to the jury, Judge Pollack stated:

"I will now turn to the defendants, one by one, with respect to their alleged connection with the counts in which they are charged.

The defendant Benjamin Mallah is charged in Count 1 with conspiracy. The government contends that the defendant Mallah was connected in some or another manner to the alleged conspiracy by the witnesses Lipsky, Mrs. Mileto, Conforti, and by the government Agents Stromfeld, Hayward, Samuel and Wanieski, and also by Sergeant De Luca and Patrolman Lino, and by the stipulated testimony of Nancy O'Malley and by testimony from Mark Miklitsch, a fifteen-year-old boy." (Tr. 1696).

Gerald Lino testified about a conversation between Sperling and Mallah that he overheard on August 16, 1972 while secreted in a car parked in front of the barber-shop at 844 Seventh Avenue:

Sperling: "I got to have the stuff."

Mallah: "Don't worry about it."

Sperling: "Fifty thou, right."

Mallah: "Yes, right, fifty-fifty."

Sperling: "But I got to have it. You know I need it."

Mallah: "Don't worry about it. I'll see the people this afternoon, tonight or early tomorrow. You should have it."

Sperling: "But I need it."

Mallah: "Don't worry about it. If the people were straight, if they are not on the run we should have it." (Tr. 1182).

Patrolman Lino minutes later overheard co-conspirator Norman Goldstein ask Barney Barrett, "Are they going to get it?", to which Barrett replied that he didn't know. Goldstein then sent Barrett back into the bar; which Sperling and Mallah had entered, to find out. Barrett came out shortly and told Goldstein, "Yes, we should have it tomorrow" (Tr. 1180-85). Photographs taken at the time of these conversations show Mallah and Sperling standing next to the car in which Patrolman Lino was hidden and also show Barrett and Goldstein close by. (Tr. 1135-36, 1189; GX 61B, 61C, 61D). Patrolman Lino also testified that the word "stuff" in the Mallah-Sperling conversation referred to a quantity of narcotics. (Tr. 1188-89).

Finally, of course, Mallah's defense that he did not know Conforti, Louis or Cecile Mileto, and that he had never been at 5 Spring Street was refuted by numerous

witnesses on the Government's rebuttal case, and, as this Court noted, "[t]here was also evidence that Mallah fled when he heard that some members of the conspiracy had been arrested." 503 F.2d at 976.*

In this context, an earlier disclosure of the "new" evidence Mallah claims to have "discovered" simply could not have had an impact on the verdict. As Judge Pollock noted, Conforti's testimony, including that pertaining to Jack Spada, was sharply attacked on summation as incredible for a number of reasons. (App. 34). Cf. *United States v. Pacelli*, 521 F.2d 135, 137-39 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); *United States v. Rosner*, 516 F.2d 269, 273-74 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976). More particularly, the hospital transaction, which was not part of the Government's case and was elicited only during cross-examination, did not implicate Mallah at all; if anything, it served to undermine Conforti's credibility, since he admitted his own involvement in it. Indeed, it was totally irrelevant to any matter at trial whether Spada was actually present or not; since Spada was not on trial, his presence or absence was a matter of supreme indifference to all parties.

In short, given the totally collateral nature of the event about which Conforti is now claimed to have lied,**

* In addition, co-conspirators Cecile Mileto and Barry Lipsky testified about their knowledge of Mallah's narcotics activities (Tr. 46-50, 87, 94-96, 134, 148-49, 204-06), and at the time of his arrest Mallah had \$8,500 in his possession, as well as identification in a fictitious name. (Tr. 1258-59; GX 74).

** The hospital delivery which was admitted by Conforti for the first time on cross-examination, was corroborated by a pre-existing tape recording. The sole issue to which the "new" evidence relates is whether Spada was present.

and given the wealth of other evidence against Mallah, Judge Pollack was correct in concluding that Conforti's credibility was not the decisive factor in the conviction and that there was thus no "reasonable likelihood" that the new evidence would have affected the verdict. Judge Pollack, of course, was in the best possible position to assess the potential impact of the evidence since he "had the advantage of intimate familiarity with the case born of many pre- and post-trial motions and a long trial where he had the opportunity to observe the witnesses." *United States v. Franzese*, 525 F.2d 27, 32 (footnotes omitted) (2d Cir. 1975), *cert. denied*, 424 U.S. 921 (1976). His exercise of discretion was not abused in this case. See *United States v. Franzese*, *supra*; *Machibroda v. United States*, 368 U.S. 487, 495 (1962).

B. Mallah failed to exercise due diligence in discovering the claimed perjury.

It is settled law that a defendant seeking a new trial under any theory must satisfy the District Court that the material asserted to be newly discovered evidence is in fact such and could not with due diligence have been discovered before or at trial. *United States v. Natelli*, Dkt. No. 76-1494, slip op. 2557, 2560-61 (2d Cir. March 28, 1977); *United States v. Stofsky*, 527 F.2d 237, 244 (2d Cir. 1975), *cert. denied*, 97 S. Ct. 66 (1976); *United States v. Bermudez*, 526 F.2d 89, 100 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976); *United States v. Costello*, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958). The hospital delivery was known to the defense, and not the Government,* prior to trial by virtue

* In summation, the Government prosecutor noted that that was the first time Conforti told anyone in the Government about the hospital delivery. (Tr. 1606).

of their possession of the tape recording. Likewise, Sam Kaplan, who like Mallah had been represented by Mr. La Rossa, was available to the defense,* and in fact it appears to have been Kaplan who had provided the tape recording to Mr. La Rossa.

Mallah now claims that Judge Pollack erred in finding a lack of diligence, because he claims that finding presupposes that there was a hospital delivery and that Sam Kaplan was involved. (Br. 17). This argument is ludicrous. Defense counsel was aware of the allegation by Conforti that there was a hospital delivery and that Jack Spada had been with Conforti when the delivery was made. As Judge Pollack correctly noted, in light of the allegation, defense counsel could have questioned their former client to ascertain the dates he was in the hospital and could have asked the Government the location of Spada during that same time period. At no time did defense counsel request either the United States Attorney or the Federal Bureau of Prisons to provide information concerning Spada's whereabouts at the time of the alleged transaction.

In seeking a new trial, the burden is on the defendant to establish that he could not with due diligence have discovered the evidence before or at the latest at trial. *United States v. Schwartzbaum*, 527 F.2d 249, 254 (2d Cir. 1975), *cert. denied*, 424 U.S. 942 (1976). The failure to request any such information bars this motion. *United States v. Stofsky*, *supra*.

* Kaplan had been acquitted of conspiracy in *United States v. Sperling*. While he may not have been available to testify, he clearly was available to provide his former defense counsel with the dates of his hospital stays as well as to identify Jack Spada from the information provided by Conforti during the taped conversation.

C. Mallah's Rule 33 motion is untimely.

Rule 33 of the Federal Rules of Criminal Procedure requires that a motion for a new trial on newly discovered evidence must be made within two years of final judgment. On December 9, 1974, Mallah's motion to stay the issuance of the mandate was denied. On December 11, 1974, the mandate issued. Thereafter the Supreme Court denied *certiorari* on March 25, 1975. The date of final judgment is the date of the issuance of the mandate, notwithstanding the pendency of a petition for *certiorari*.^{*} *Oddo v. United States*, 171 F.2d 854, 858 (2d Cir. 1949); 2 Wright, Federal Practice and Procedure, § 558 at 536 (1969); See also, *United States v. Granza*, 427 F.2d 184, 185 (5th Cir. 1970); *Harrelson v. United States*, 191 F.2d 874 (5th Cir. 1951); But cf., *United States v. Cody*, 529 F.2d 564 (8th Cir. 1976). Since the present motion was filed on January 7, 1977, more than two years after the issuance of the mandate, it is untimely.^{**}

In light of this difficulty with timeliness, Mallah has now sought to characterize this motion for a new trial as

^{*} A comparison of Rule 35 with Rule 33 provides further support that final judgment for Rule 33 purposes means the date of issuance of the mandate. Rule 35 provides that the 120 days in which to make a motion for reduction of sentence begins to run "after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review. . ." In such a situation, the rule of statutory interpretation *Expressio unius est exclusio alterius* is particularly applicable. If Congress had meant the two year limitation should not begin to run until after the petition for *certiorari* had been denied, they would have expressly so stated, as they saw fit to do in Rule 35.

^{**} Aside from its jurisdictional significance, of course, Mallah's decision not to pursue the matter for several years after his trial indicates that the issue of Spada's whereabouts during the hospital delivery was not of great significance to him.

a petition under 28 U.S.C. § 2255. In *McWilliams v. United States*, 360 F. Supp. 470, 473 (E.D. Missouri, 1973), the District Court faced the same situation:

"No doubt because of its untimeliness, petitioner has designated his motion as one filed under Section 2255, but such does not change its inherent character . . ."

As such, the Court denied the motion for a new trial as untimely, despite the characterization by the defendant.*

* The distinction between a Rule 33 motion and a Section 2255 motion is of more than semantic significance. As this Court has expressly noted, there is great doubt whether a charge of perjury *simpliciter* provides a jurisdictional basis for a claim for relief under 28 U.S.C. § 2255, since there is no claim under the "Constitution or the laws of the United States." *Brach v. United States*, 542 F.2d 4, 8 (2d Cir. 1976); *United States v. Franzese*, *supra*, 525 F.2d at 31, n. 7. Furthermore, Mallah's naked allegations that the Government knew or should have known of the claimed perjury is as insufficient as the similar claim made in the earlier motion, the denial of which was affirmed by this Court. In particular, as noted, the prosecutor was wholly unaware of the entire hospital transaction until it was elicited on cross-examination. (Tr. 1606). Furthermore, a claim that the Bureau of Prisons is an "arm of the government" for such purposes is frivolous in light of this Court's decision in *United States v. Stassi*, 544 F.2d 579, 582 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 1176 (1977).

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York)

ROBERT J. COSTELLO, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the 18th day of May, 1977
he served a copy of the within Brief
by placing the same in a properly postpaid franked
envelope addressed:

Fischetti & Shargel, Esqs.
1290 Avenue of the Americas
New York, New York 10019

And deponent further says that he sealed the said envelope and placed the same in the wall of the post office mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

ROBERT J. COSTELLO

Sworn to before me this

18th day of May, 1977

Gloria Meyer

GLORIA MEYER
Notary Public, State of New York
No. 31-0535340
Qualified in New York County
Commission Expires March 30, 1979

BEST COPY AVAILABLE